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Supreme Court of the United States

October Term, 1961

No. 454

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

The Government has evidently misunderstood, and hence has failed to meet, the nature of the argument made by petitioner in Point II of his original brief in this case, which addresses itself to the "balancing doctrine" as applied by this Court in *Barenblatt* v. *United States*, 360 U. S. 109; *Bates* v. *City of Little Rock*, 361 U. S. 516; *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Scull* v. *Virginia*, 359 U. S. 344 and *Shelton* v. *Tucker*, 364 U. S. 479.

Our argument is restated, we hope more clearly, at pages 1 to 5 of the reply brief filed in *Yellin* v. *United States*, No. 477 this Term, where the same situation exists, and this Court is respectfully referred to that reply brief.

II

In its effort to justify the questions put to petitioner, the Government now contends that they had pertinency other than the Committee's never-ending quest for names (Government's Brief, pp. 24, 34, 50). To this argument, there are two answers:

First, at the hearing the Committee itself claimed, as the only pertinency of the questions at issue, the fact that the answers would supply the names of more prospective witnesses (Record 28, 31, 34). The Committee is bound by its own explanation of pertinency and may not now think up new justifications of the questions put (*Watkins* v. *United States*, 354 U. S. 178, 214-215; *Deutch* v. *United States*, 367 U. S. 456, 468).

Second, the new justification of pertinency is not borne out by the record. It is argued at page 34 of the Government's brief that the answers to the questions actually asked "would in and of themselves have provided information of considerable value to the Committee." We fail to see how, and the Government no more explains this justification for pertinency in its brief, than the Committee did at the hearing. The declared purpose of the Committee was to ascertain current evidence of "Communist activity" so that the Congressional Committee hearings of earlier years could be brought up to date (Government's Brief, p. 46). In view of the fact that the petitioner had not been a member of the Party for about nine years and that, indeed, his disassociation from the Party had preceded the earlier Congressional hearings, we can see no possible relevance to the answers "in and of themselves".

III

The Government, in arguing that there was no probable cause for the issuance of a subpoena to petitioner, refers to the *Barenblatt* case and particularly to footnote 24 at 360 U. S. 125. The language there used by the Court might better be cited in support of petitioner's contention. According to this Court in *Barenblatt*, there was material in the Committee files, "some . . . in the nature of evidence," showing "clearly" that Barenblatt had information about the subject under inquiry, namely, "Communist infiltration into the field of education" (360 U. S. at 113). But in this case there was (1) nothing at all in the Committee files "in the nature of evidence" but rather scraps of rumor and gossip about petitioner's activities many years before and about the political beliefs of his son; and (2) even this gossip did not relate to the subject under inquiry, namely, Communist activity in the communications industry in 1957.

The Government, to add weight to its "probable cause" argument further points out that petitioner was a member of American Communications Association and apparently urges that that fact alone can be cited as "probable cause" for the issuance of a subpoena. But this argument serves merely to underline petitioner's point. American Communications Association has thousands of members and certainly the issuance of a subpoena on that basis constitutes the most indiscriminate type of the dragnet procedure forbidden by this Court.

April 16, 1962.

Respectfully submitted.

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